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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Tariff Filing Requirements for Nondominant Common Carriers | ) | CC Docket No. 93-36 |
| | ) | |

# REPLY COMMENTS OF PACIFIC BELL AND NEVADA BELL

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## SUMMARY

The Commission's proposed rules suggest that competition will benefit if unequal regulatory burdens are applied to "dominant" and "nondominant" carriers. But neither the Commission nor any party has shown how this could be true. The Commission has not actually examined the effect of asymmetrical regulation on competition. The proposed rules simply assume that all favorable developments in interexchange and local exchange markets "must be attributed in part" to asymmetrical regulation. The Commission also points to the proliferation of competitors as evidence that "competition" has benefited from asymmetry. But this is equally consistent with our view that a price umbrella exists, that existing regulation keeps the umbrella artificially high, and that inefficient "competitors" are being subsidized by consumers. Existing regulation promotes the interests of the owners of these "competitors." But there is no evidence it promotes competition or lower prices.

We submit that streamlined regulation of competitive markets would be in the public interest if, and only if, it were applied equally to all providers. Although we oppose the proposed rules, we invite the Commission to examine actual markets and eliminate asymmetrical regulation in competitive markets. The distinction between "dominant" and "nondominant" carriers, which is overly broad and has never been tested, should not escape reexamination now that the Commission has ordered us to provide mandatory collocation and expanded interconnection to

our competitors. The Commission is being inconsistent. It is forcing us to give up all of the supposed advantages of being a "dominant" carrier, while continuing to regulate us as if we were.

The proposed rules also may run afoul of the Communications Act. Cases like Maislin and Regular Common Carrier Conference strongly suggest the Commission lacks the authority to streamline its tariffing rules for supposedly nondominant carriers in the way it proposes to. The Commission can avoid this potential pitfall by streamlining regulation of all providers of competitive services (like high capacity digital access service) in the same way it streamlined regulation of AT&T's business services in Docket 90-132. The Commission should examine the actual market power of carriers in specific markets.

The proposed rules should not be adopted. The Commission should examine the characteristics of specific markets, applying the same criteria that it applied in Docket 90-132 to the interexchange business services market, and streamline regulation for all providers in markets where no carrier has sufficient market power to impede the effective functioning of competition.

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**REPLY COMMENTS OF PACIFIC BELL AND NEVADA BELL**

Pacific Bell and Nevada Bell (the Pacific Companies) hereby reply to comments filed in the above-captioned proceeding.[1] We believe the Commission's proposed rules are misguided insofar as they suggest that competition will benefit if the Commission continues to apply unequal regulatory burdens to "dominant" and "nondominant" carriers. The rules are based on assumptions that, under scrutiny, turn out to be unsupported, unreasoned, or simply untrue.

The Commission has not actually examined the effect of asymmetrical regulation on competition. Its proposed rules simply proceed from untested assumptions, such as the suggestion -- which is inconsistent with what the Commission has said elsewhere[2] -- that reductions in long distance rates "must be

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[1] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Notice of Proposed Rulemaking, CC Docket No. 93-36 (FCC 93-103), released February 19, 1993 ("NPRM").

[2] See Competition in the Interstate Interexchange Marketplace, 4 FCC Rcd 2873, para. 365 (1991).

attributed in part" to asymmetrical regulation. NPRM, para. 10. The Commission also points to the proliferation of competitors as evidence that "competition" has benefited from asymmetry. NPRM, para. 11. But the existence of many providers also supports our view that a price umbrella exists, that existing regulation keeps the umbrella artificially high, and that inefficient "competitors" may be extracting an unjustified premium from consumers.[3] Existing regulation undeniably promotes the interests of the owners of these "competitors". But it has not been shown to promote competition or consumers.

We submit that streamlined regulation of competitive markets would be in the public interest if, and only if, it were applied equally to all providers. Although we oppose the proposed rules, we invite the Commission to examine actual markets and eliminate asymmetrical regulation where competition exists. No one has proved that asymmetrical regulation in such markets promotes competition, reduces prices, or otherwise serves the public interest, as the Commission and some parties have suggested. The evidence points the other way.

In addition, cases like Maislin[4] and Regular Common Carrier Conference[5] strongly suggest the Commission lacks the

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[3] See Reply Comments of Pacific Bell and Nevada Bell, CC Docket No. 91-213, filed March 19, 1993.

[4] Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990).

[5] Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986).

authority to streamline its tariffing rules for supposedly nondominant carriers in the way it proposes to. The Commission can avoid this potential pitfall by streamlining regulation of all providers of competitive services (like high capacity digital access service) in the same way it streamlined regulation of AT&T's business services in Docket 90-132. The Commission should examine the actual market power of carriers in specific markets. The distinction made by the Commission between "nondominant" and "dominant" carriers is artificial, untested, and overly broad. It has also been rendered obsolete by the Commission's own actions mandating expanded interconnection and physically collocation.

The proposed rules should not be adopted. The Commission should examine the characteristics of specific markets, applying the same criteria that it applied in Docket 90-132 to the interexchange business services market, and streamline regulation for all providers in markets where no carrier has sufficient market power to impede the effective functioning of competition.

## I. STREAMLINED REGULATION OF COMPETITIVE SERVICES PROMOTES FURTHER COMPETITION. ASYMMETRY DOES NOT.

nondominant carrier tariffs "allows competitors time to begin, and possibly complete, development and implementation of a market response before the tariff becomes effective ... [it] delays the benefits customers receive from new offerings, and discourages carriers from taking pro-consumer actions." NPRM, para. 15. Electric Lightwave, Inc. (ELI) says "incumbents ... use the regulatory process to unfairly enhance their competitive advantage ... to thwart entry and delay new service offerings" (p. 2). MFS Communications Co. (MFS) says:

> Under a fourteen-day notice period, the LECs likely would file harassing oppositions to nondominant carriers' tariffs, thereby seeking to delay the implementation of those tariffs.... LECs, whose legal costs are incorporated into their rate base with guaranteed recovery from monopoly services, have the ability and incentive to deplete CAP resources through nuisance litigation (p. 9).

See also MCI, p. 2.

These contentions stand reality on its head. We have never before protested a nondominant carrier's interstate tariff filing, let alone subjected such a carrier to "nuisance litigation."[6] But nondominant carriers -- CAPs as well as IXCs -- have protested our interstate tariffs too many times to recount here. It cannot be denied that these protests have

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[6] That does not mean we never will protest such tariffs. The MFS "maximum rate" tariff we described in our Comments, for example, appeared to us to be unlawfully vague and fails to describe MFS's actual practices. See our Comments, pp. 12-13.

attempted to thwart reasonable responses to our customers' needs and unnecessarily burdened the Commission.

Under current rules, nondominant carrier filings are presumed lawful and take effect after just fourteen days. Our own tariffs for new services, rate restructures, or out-of-band filings take effect on no less than forty-five days and in some cases more.[7] Thus we have no practical ability to "begin, and possibly complete, development and implementation of a market response before the [nondominant carrier's] tariff becomes effective," as the Commission supposes. NPRM, para. 15.[8] With our competitors subject to much shorter notice periods and exempt from filing any cost support, it is the other way around.[9]

Some of our competitors argue that asymmetrical regulation is necessary to prevent us from using our "monopoly" to compete unfairly with them, through cross-subsidies or other unspecified means. The Association for Local Telecommunications Services (ALTS), for example, alleges that the LECs are "hugely profitable companies with both the incentive and ability to eliminate competition by cross-subsidizing competitive services with monopoly rents". ALTS, p. 4. The Information Technology

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[7] See 47 CFR §61.58.

[8] MFS's suggestion (above) that we are "guaranteed recovery" of the "legal costs" of "nuisance litigation" through "monopoly services" is nonsense. We were not "guaranteed recovery" of any costs even under cost-of-service regulation, and particularly are not under price cap regulation.

[9] See our Comments, n. 11.

Association of America (ITAA) says that LECs "still possess substantial market power. They are thus in a position to exploit their local monopoly and charge unjust and unreasonable rates. Full tariff regulation is therefore necessary to help protect users against such abuse." ITAA, p. 4. MFS contends that "continued tariff regulation of LECs is justified by their overwhelming market power ... LECs merit vigilant regulation because of their insusceptibility to market pressures. Today, the LECs dominate more than 99% of the market for local services." MFS, p. 5 (emphasis in original).

These are gravely defective contentions. First, they have been mooted by mandatory collocation and expanded interconnection. Competitors will now have access to all of the purported advantages of our universal networks, at a relatively insignificant cost, without having to bear any of the burdens of serving high-cost areas or customers.

Second, the cross-subsidies flow from competitive services to "monopoly" ones, not the other way around. The Commission has recognized this subsidy flow from competitive services to noncompetitive services in Dockets 91-141 and 91-213.[10] Our competitors take advantage of LEC rates that are required to be far above incremental costs, using such LEC rates

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[10] See, for example, Transport Rate Structure and Pricing, 7 FCC Rcd 7006, n. 125 (a "usage-based interconnection charge permits continuation of support flows currently reflected in LEC access rates"); Expanded Interconnection with Local Telephone Facilities & Amendment of the Part 69 Allocation of General Support Facilities Costs, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992).

as price umbrellas to the detriment of consumers. Current regulation distorts the costs and true demand for competitive services. Our competitors are expanding by extracting an incidental premium from consumers. Indeed, some of our

Decades of regulation have gone into ensuring that no subsidy from one product or area to another occurs without the Commission's approval. That is what Parts 36, 64, and 69 of the Commission's rules are all about. Our competitors speak as if these rules did not exist, and as if "local services" were all one, unsegmented market.

The "vigilant regulation" that MFS refers to is not free. It is being paid for by consumers. Our rates for competitive services are not unjustly and unreasonably low, as ITAA suggests. If anything, they are required to be too high to avoid an eventual loss of contribution to universal service. The Commission has never actually examined our market power in

parties, agree. They state additional reasons the proposed rules

itself concluded, in Docket 90-132, that the legislative history of the Act shows that Section 203 was intended to have the same meaning as the correlative provisions of the Interstate Commerce Act.[12] The filed rate doctrine is fundamental to the Communications Act.[13] It is one of the principles that apply "across the spectrum of regulated utilities."[14]

MCI is flatly wrong to suggest that what Section 203(a) prohibits, the Commission may accomplish under Section 4(i). See MCI, p. 16. Section 4(i) allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[15] On its face, Section 4(i) does not permit the Commission to take any action that is inconsistent with Section 203(a). This same principle was expressed by the D.C. Circuit in a recent FERC case. In Public Service v. FERC, 866 F.2d 487 (D.C. Cir. 1989), the agency sought to use the general grant of authority in Section 16 of the Federal Power Act (which is comparable to Section 4(i) of the Communications Act) to override statutory ratemaking procedures. The D.C. Circuit struck down the proposed procedure, firmly

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12 Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5897, n. 145.

13 See AT&T v. FCC, 836 F.2d 1386, 1394 (Starr, C.J., concurring) (D.C. Cir. 1988).

14 Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981).

15 47 U.S.C. §154(i) (emphasis added).

rejecting the notion that Section 16 "might possess some exceptional power to trump" the ratemaking procedures. 866 F.2d at 490-91. An agency, the court emphasized, must "adhere to the basic framework of the Act, despite resulting inconvenience." 866 F.2d at 491.

## III. CAPS ARE COMMON CARRIERS.

The Ad Hoc Telecommunications Users Committee (Ad Hoc) and the Penn Access Corporation (Penn Access) object to competitive access providers (CAPs) being categorized as common carriers. They take the position that some or all CAP activities constitute private rather than common carriage. Penn Access, passim; Ad Hoc, pp. 17-22. If this were true, CAPs would not have to file tariffs for some or all of their services, as Section 203 requires, because they would not be subject to Title II of the Act.

Ad Hoc and Penn Access are attempting to carve out special, unjustified exceptions for vaguely defined entities or activities. The distinction these parties urge on the Commission is undefinable and unenforceable. Ad Hoc, for example, says that nondominant carriers should be able to "withdraw some stated percentage of their capacity from common carrier use in order to use it to provide common carriage." Ad Hoc, p. 21. It is unclear to us, as either a legal or a factual matter, how the Commission could regulate "some ... capacity" under Title II and refrain from regulating other "capacity", perhaps even on the same facility.

Untenable distinctions such as the one that Ad Hoc and Penn Access urge on the Commission depend on a circular and oversimplified definition of "common carrier". Ad Hoc quotes NARUC I[16] out of context to imply that a carrier is not a common carrier unless it "undertakes to carry for all people indifferently." Ad Hoc, p. 18. If the test were that simple, the very act of discrimination between customers would exempt a carrier from Title II regulation. The actual test is more subtle and less circular. CAPs do not have to hold themselves out to "all people" to be common carriers. It is enough if they "offer a service that may be of practical use to only a fraction of the population ... The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use." 525 F.2d at 642. The Court continued:

> In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of ... [the carrier's] operations to expect an indifferent holding out to the eligible user public. Id.

CAPs meet both of these criteria, though meeting just one would be enough to make them common carriers. First, the D.C. Circuit's forbearance decision means nothing if it does not mean that nondominant carriers are under a legal compulsion to

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[16] National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

file tariffs and avoid discrimination.[17] The Commission cannot avoid the effect of the forbearance decision merely be reclassifying nondominant carriers as non-common carriers. Second, no one has presented evidence that CAPs do not hold themselves out indifferently to all potential users, for example, all customers with access to their metropolitan fiber rings. On the contrary, some CAPs freely describe themselves as common carriers.[18] Holding oneself out as a common carrier, as these CAPs have, disposes of the issue completely. See 525 F.2d at 643. The Commission cannot rationally determine that some CAPs are common carriers and other CAPs who offer the same services to the same market segment are not common carriers. It should not adopt a distinction that CAPs themselves cannot seem to agree on.

## IV. CONCLUSION.

For these reasons, the Pacific Companies oppose rules that would permit nondominant carriers to file tariffs containing a maximum rate or a range of rates on one day's notice. Streamlined regulation will benefit competition and consumers if, and only if, the Commission extends it to all providers of competitive services in competitive markets. The Commission's own actions have made asymmetrical regulation obsolete. The Commission should examine specific markets using the criteria it

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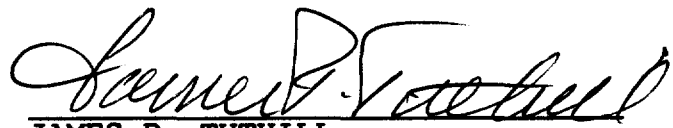
17 AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

18 See, for instance, Comments of Teleport Communications Group, CC Docket No. 91-141, filed August 6, 1991, p. 1.

applied in Docket 90-132. If the markets meet those criteria, all providers should be regulated equally.

Respectfully submitted,

PACIFIC BELL
NEVADA BELL



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Date: April 19, 1993

CERTIFICATE OF SERVICE

I, J. L. Bennett, on behalf of Pacific Bell, do hereby certify that I caused a copy of the foregoing "Reply Comments of Pacific Bell and Nevada Bell" in connection with Tariff Filing Requirements for Nondominant Common Carriers, pursuant to CC Docket No. 93-36, to be served to the parties indicated on the attached Service List by hand delivery or by United States mail, postage prepaid, on this 19th day of April, 1993.

I am a citizen of the United States, State of California and over eighteen years of age.

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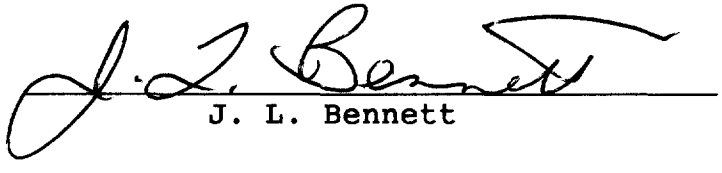
By: 
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